

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DENISE FULEIHAN, individual,

Plaintiff,

v.

WELLS FARGO dba AMERICA'S
SERVICING COMPANY, a foreign
corporation; FREMONT GENERAL
CORPORATION, a Nevada corporation,
successor to FREMONT INVESTMENT
AND LOAN, a foreign corporation; U.S.
BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR SG MORTGAGE
SECURITIES ASSET BACKED
CERTIFICATES SERIES, 2006-FRE2;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a foreign
corporation, and DOES 1-5, inclusive; and
ROES I-V, inclusive,

Defendants.

2:09-cv-01877-RCJ-PAL

ORDER

Currently before the Court is Plaintiff Denise Fuleihan's *pro se* motion to vacate the Court's September 15, 2010 Order dismissing her first amended complaint, denying her leave to file her second amended complaint, and granting summary judgment in favor of certain defendants. (Mot. to Vacate (#116)). Because this Court lacks jurisdiction to hear the matter, Plaintiff's motion to vacate (#109) is denied.

On September 15, 2010, this Court issued an Order which, among other rulings, (1) granted motions to dismiss Plaintiff's first amended complaint filed by Wells Fargo and Fremont Investment & Loan; (2) denied Plaintiff's motion for leave to file her second amended complaint; (3) denied Plaintiff's motion to modify an injunction issued by this Court; and (4)

1 granted summary judgment in favor of Defendants Wells Fargo, US Bank, and Mortgage
2 Electronic Registration Systems, Inc. (Order (#109) at 13-14). Plaintiff then filed a notice of
3 appeal to the Ninth Circuit on October 14, 2010. (Notice of Appeal (#112)). On March 24,
4 2011, Plaintiff filed in this Court a motion to vacate the Order issued on September 15, 2010,
5 claiming (1) the Court lacked jurisdiction to issue the Order because Plaintiff filed for
6 bankruptcy and the automatic stay was in effect, and (2) she has obtained newly discovered
7 evidence in the form of a declaration from a consumer right's expert. (Mot. to Vacate (#116)
8 at 3-4).

9 "Rule 60(b) allows a party to seek relief from a final judgment, and request reopening
10 of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528
11 (2005). Circumstances that warrant relief from a final judgment include:

12 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
13 discovered evidence that, with reasonable diligence, could not have been
14 discovered in time to move for a new trial under Rule 59(b); (3) fraud
15 (whether previously called intrinsic or extrinsic), misrepresentation, or
16 misconduct by an opposing party; (4) the judgment is void; (5) the judgment
has been satisfied, released or discharged; it is based on an earlier judgment
that has been reversed or vacated; or applying it prospectively is no longer
equitable; or (6) any other reason that justifies relief.

17 FED. R. CIV. P. 60(b). Motions under Rule 60(b) must be made within a "reasonable time."
18 FED. R. CIV. P. 60(c)(1). Moreover, motions for relief that are based on mistake, newly
19 discovered evidence, or fraud must be brought within one year of final judgment. FED. R. CIV.
20 P. 60(c)(1). Motions to reconsider and vacate are generally left to the discretion of the trial
21 court. See *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985).

22 Plaintiff filed her motion to vacate apparently based on mistake and newly discovered
23 evidence on March 24, 2011. (Mot. to Vacate (#116)). As the Order was issued by this Court
24 on September 15, 2010, Plaintiff has properly filed her motion within the one-year time frame
25 allotted by Fed. R. Civ. P. 60(c)(1).

26 However, this Court ultimately lacks jurisdiction to hear the motion because Plaintiff has
27 filed a notice of appeal. By filing a notice of appeal, jurisdiction over a case is transferred to
28 the court of appeals. *Ruby v. Sec'y of U.S. Navy*, 365 F.2d 385, 388 (9th Cir. 1966).

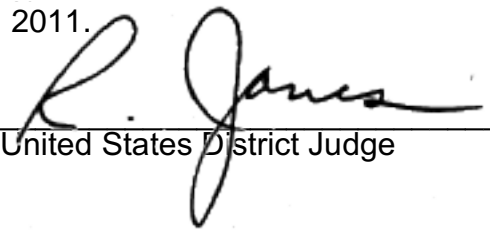
1 Accordingly, “[o]nce an appeal is filed, the district court no longer has jurisdiction to consider
2 motions to vacate judgment.” *Davis v. Yageo Corp.*, 481 F.3d 661, 685 (9th Cir. 2007). A
3 district court may only hear and decide a Rule 60(b) motion after a notice of appeal has been
4 filed if the movant follows a specific procedure, which is to “ask the district court whether it
5 wishes to entertain the motion, or to grant it, and then move [the court of appeals], if
6 appropriate, for remand of the case.” *Id.* (quoting *Gould v. Mut. Life Ins. Co. of N.Y.*, 790 F.2d
7 769, 772 (9th Cir. 1986)).

8 Plaintiff filed a notice of appeal on October 14, 2010. (Notice of Appeal (#112)). This
9 Court consequently lacks jurisdiction to hear the motion to vacate. Although the Court may
10 hear the matter if Plaintiff first asks this Court whether it wishes to entertain the motion and
11 then requests that the Ninth Circuit remand the case, Plaintiff has failed to follow this
12 procedure. As a notice of appeal has been filed and Plaintiff has not followed the proscribed
13 procedure which would allow this Court to hear her motion, the Court lacks jurisdiction and
14 Plaintiff’s motion to vacate is dismissed accordingly.

15 For the foregoing reasons, IT IS ORDERED that Plaintiff’s motion to vacate (#116) is
16 dismissed.

17 IT IS FURTHER ORDERED that Oral Argument set for Monday, February 6, 2012 is
18 VACATED.

19 Dated this 29th day of December, 2011.

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21 United States District Judge
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